

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THERESA SMITH)	
Claimant)	
VS.)	
)	
GOODWILL INDUSTRIES)	Docket No. 237,140
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on November 2, 1998.

ISSUES

The ALJ granted claimant's request for temporary total disability benefits and medical expenses. Respondent's application for review asks the Board to examine the following issues: (1) whether claimant's injury arose out of and in the course of employment with respondent; (2) whether the parties received proper notice of claimant's Application for Preliminary Hearing; and, (3) the date of accident for claimant's alleged injury. The date of accident is relevant to whether claimant gave timely notice as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the ALJ should be affirmed.

Claimant's Application for Hearing alleges accidental injury during the period of November 1997 through June 20, 1998, the dates claimant was employed by respondent. Claimant alleges injury to her neck and middle and lower back, not from specific incidents, but from repetitive work activities during that period. Claimant worked as a manager of a Goodwill store for respondent and her duties included moving furniture.

From time to time, claimant noticed soreness in her back which she attributes to lifting at work. Beginning late 1997 and early 1998, the problems with her back did not resolve as they had before. As a consequence, she went to her family physician in March 1998. In June 1998, Dr. Debbie R. Bassham referred claimant to Dr. Kris Lewonowski. Claimant testified that her back problems gradually worsened until she left her employment June 20, 1998. Claimant acknowledges she did not notify respondent of the injury until June 22, 1998.

The Board first finds that claimant has established accidental injury arising out of and in the course of her employment. Claimant's testimony indicates claimant's work is the cause of the injury and no other more probable alternative is proposed.

The Board also concludes that the date of accident for this injury should be considered to be June 20, 1998, in accordance with *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). Respondent argues for an earlier date of accident and notes that claimant missed some work after seeing Dr. Bassham in March 1998. The Board considers the June 20, 1998, date of accident to be more consistent with *Berry* and related appellate court decisions. With June 20, 1998, as the date of accident, claimant's notice on June 22, 1998, was within the ten-day period required under K.S.A. 44-520.

Respondent's insurance carrier, St. Paul Fire & Marine, next contends that the order exceeded the jurisdiction of the ALJ because St. Paul Fire & Marine was not notified of the preliminary hearing. St. Paul Fire & Marine apparently took over the insurance coverage beginning June 1, 1998. Claimant filed an Application for Hearing alleging, as indicated, a date of accident from November 1997 through June 20, 1998, obviously extending into the coverage period of St. Paul Fire & Marine. The Application for Hearing did not identify the insurance carrier, but the subsequent notice by the Division did identify Cornhusker Casualty Company. Notice of the preliminary hearing was to respondent and Cornhusker Casualty. Respondent then wrote claimant's counsel and indicated that St. Paul had advised them the proper date of accident was actually in February 1998. This letter suggests that St. Paul was aware of the claim before the hearing in October 1998.

Regardless, the Board has previously held that the ALJ has jurisdiction on proper notice to the respondent. *Martel v. Waste Management of Wichita*, Docket No. 222,516 (July 1997). As noted in that decision, K.A.R. 51-3-5a requires notice to the adverse party. K.S.A. 40-2212 provides that every workers compensation policy contain a provision indicating that notice to the insured acts as notice to the insurer.

Therefore, the Appeals Board finds that the Order entered by the ALJ did not exceed his jurisdiction.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Jon L. Frobish on November 2, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director